STATE OF MICHIGAN

COURT OF APPEALS

TAYLOR C. SEGUE III,

Plaintiff-Appellee/Cross-Appellant,

v

WAYNE COUNTY,

Defendant-Cross-Appellee,

and

TURKIA AWADA MULLIN,

Defendant-Appellant.

UNPUBLISHED
May 22, 2014

No. 310282
Wayne Circuit Court
LC No. 11-013278-CL

TAYLOR C. SEGUE III,

Plaintiff-Appellee,

v

TURKIA AWADA MULLIN,

Defendant-Appellant,

and

WAYNE COUNTY,

Defendant.

No. 310499
Wayne Circuit Court
LC No. 11-013278-CL

Before: CAVANAGH, P.J., and OWENS and M. J. KELLY, JJ.

PER CURIAM.

These consolidated appeals arise from plaintiff Taylor C. Segue III's claims of wrongful termination and tortious interference. In Docket No. 310282, defendant Turkia Awada Mullin appeals by right the trial court's order denying her motion to dismiss Segue's claim against her on the ground that she is immune from suit as the highest executive employee of a level of

government. On cross-appeal, Segue argues that the trial court erred when it dismissed his claim of wrongful termination against defendant Wayne County under MCR 2.116(C)(8). In Docket No. 310499, Mullin appeals by leave granted the trial court's decision to deny her motion to dismiss under 2.116(C)(8). For the reasons more fully explained below, we affirm in part, reverse in part, and remand for proceedings.

I. EXECUTIVE IMMUNITY

Mullin first argues that she has absolute immunity as the highest appointive executive of Wayne County's Department of Economic Development Growth Engine. Because she was immune from suit, she maintains, the trial court erred when it refused to dismiss Segue's tortious interference claim against her. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court also reviews de novo whether the trial court correctly selected, interpreted, and applied the relevant statutes. *Gay v Select Specialty Hosp*, 295 Mich App 284, 291-292; 813 NW2d 354 (2012).

The Michigan Legislature provided that certain elective or appointive officials have absolute immunity from tort liability when acting within the scope of their authority: "A judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority." MCL 691.1407(5). To determine whether Mullin is entitled to immunity as the highest appointive executive, we must first determine whether the Department constitutes a "level of government" within the meaning of MCL 691.1407(5). *Grahovac v Munising Twp*, 263 Mich App 589, 593; 689 NW2d 498 (2004). This inquiry focuses on several factors, including "whether the entity shares aspects of governance with other political subdivisions, such as the power to levy taxes, the power to make decisions having a wide effect on members of the community, or the power of eminent domain." *Id.* at 593. We also consider the extent to which the governmental employee exercises "broad-based jurisdiction or extensive authority similar to that of a judge or legislator[,]" *id*., quoting *Chivas v Koehler*, 182 Mich App 467, 471; 453 NW2d 264 (1990), and whether the entity at issue has certain autonomous authority, *Davis v Detroit*, 269 Mich App 376, 381; 711 NW2d 462 (2005).

In *Grahovac*, the Court determined that the chief of a volunteer fire department was "not the highest appointed or elected official in a level of government" because there was no evidence that the fire department had any powers of governance, made "decisions having a wide effect on members of the community", or had "broadly based jurisdiction or extensive authority similar to that of a judge or legislator." *Grahovac*, 263 Mich App at 594. Instead, the volunteer fire department was "at the complete disposal of the township board and can neither exist nor act without that board's authorization." *Id*. Thus, the township board—not the fire department—was the relevant "level of government" and executive immunity did not, therefore, apply to the fire department's chief. *Id*. at 594-595.

In contrast, the Court in *Nalepa v Plymouth-Canton Comm School Dist*, 207 Mich App 580, 587; 525 NW2d 897 (1994), determined that a school district is a level of government because it shares "many aspects of governance with other political subdivisions traditionally considered levels of government." The school district encompassed a defined geographical area, could levy taxes, exercise eminent domain, make decisions having a wide effect on the community, and had an elected board. *Id*.

Mullin does not contest that the Department lacks the traditional powers of governance. Instead, she argues that the Department constitutes a "level of government" because various provisions in the Wayne County Charter appear to give the Department autonomous authority and the power to make decisions having a wide effect on the community. Mullin did not fully develop this argument in her brief in support of her motion for summary disposition. Typically, this Court will only consider the arguments and evidence actually presented to the trial court on a motion for summary disposition. See *Barnard Mfg*, 285 Mich App at 380-381. Nevertheless, even assuming that Mullin properly presented this line of argument, we must conclude that the Department was not a level of government within the meaning of MCL 691.1407(5).

Mullin relies heavily on this Court's decision in *Davis* for the proposition that the Department is a level of government. There, the Court determined that Detroit's fire department and water and sewage department were "levels of government" because "the Detroit City Charter and the Detroit City Code grant the fire commissioner and the board of water commissioners autonomous authority that was not alleged in *Grahovac*." *Davis*, 269 Mich App at 381. Mullin then compares the portions of the Detroit Charter cited in *Davis* to the relevant provisions of the Wayne County Charter purportedly establishing the Department and its divisions. See, e.g., Wayne Charter § 77 (approving the articles of incorporation for the economic development corporation), § 78 (establishing the predecessor to the Department).

The difficulty, however, is that those charter provisions are silent regarding the Department's autonomy. Indeed, the specific provision establishing the Department characterizes it as a coordinating entity rather than a level of government: "[t]he department shall coordinate the activities of business development, assistance, and retention as well as neighborhood preservation and enhancement . . . ." Wayne Charter § 78-1.[1] Indeed, Mullin unequivocally averred that as the Department's director, she "answered to" and "carried out the directives of" the Wayne County Executive, Robert Ficano. That is, she essentially conceded that the Department was not an autonomous governmental unit that had the power to make its own decisions, even though its actions had a wide effect on the community and even though several subdivisions fell under the Department's coordinating umbrella. On this record, the Department is more akin to the volunteer fire department in *Grahovac* than to the fire department and water and sewage department in *Davis*, or even to the school board in *Nalepa*, which exercised traditional powers of governance. The Department is not a "level of government"

[1] The "Reorganization Plan for the Executive Branch of Wayne County", which was not presented below, similarly does not demonstrate that the Department had autonomous authority.

within the meaning of MCL 691.1407(5).[2] Because the Department is not a "level of government," the trial court did not err when it denied her motion to dismiss on the ground that she had absolute immunity.[3]

II. WRONGFUL TERMINATION

Segue argues on cross-appeal that the trial court erred when it determined that his claim for wrongful termination contrary to public policy was preempted by the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*., and dismissed it. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg*, 285 Mich App at 369. This Court also reviews de novo the proper interpretation and application of the WPA. *Gay*, 295 Mich App at 291-292.

The WPA prohibits an employer from retaliating against an employee for engaging in certain protected activities. *Whitman v City of Burton*, 493 Mich 303, 305; 831 NW2d 223 (2013). To establish a prima facie case under the WPA, a plaintiff must show that "(1) he was engaged in protected activity as defined by the act, (2) the defendant discharged him, and (3) a causal connection exists between the protected activity and the discharge." *Chandler v Dowell Schlumberger Inc*, 456 Mich 395, 399; 572 NW2d 210 (1998). "A WPA claim and a public policy tort claim are mutually exclusive." *Dolan v Continental Airlines*, 208 Mich App 316, 321; 526 NW2d 922 (1995), rev'd in part on other grounds 454 Mich 373 (1997). Accordingly, a public policy claim is sustainable "only where there is also not an applicable statutory prohibition against discharge in retaliation for the conduct at issue." *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68, 79-80; 503 NW2d 645 (1993).[4] If the WPA does not apply, however, there is no preemption. *Driver v Hanley*, 226 Mich App 558, 566; 575 NW2d 31 (1997).

The WPA applies to an employee who reports of "a violation or a suspected violation of a law or regulation. . . ." MCL 15.362. Here, the trial court held that Segue's advice to Mullin that "diverting" the funds would be illegal constituted a report of a violation or a suspected violation of law. For that reason, it determined that the WPA preempted Segue's public policy

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[2] Mullin cited several unpublished cases and a foreign authority in support of the proposition that Wayne County's charter plainly shows that the Department is a level of government. However, none of those decisions involved a situation where the director admitted to answering and carrying out the directives of a higher, separate governmental entity. For that reason we find those authorities unpersuasive.

[3] Because the issue of Mullin's qualified immunity was not properly raised and developed before the trial court, we decline to address it on appeal. See *Ward v Frank's Nursery & Crafts, Inc*, 186 Mich App 120, 134; 463 NW2d 442 (1990).

[4] The trial court incorrectly stated that *Dudewicz* has been overruled. Our Supreme Court has disapproved of certain dicta in *Dudewicz* and overruled other cases relying on that dicta. *Brown v Mayor of Detroit*, 478 Mich 589, 594 n 2; 734 NW2d 514 (2007). But that dicta is not at issue here.

claim against Wayne County. We do not agree that Segue's statement of belief concerning the legality of the transfer constituted the reporting of a violation or suspected violation of law.

Segue's advice to Mullin was offered in response to Mullin's request that he transfer the funds at issue. Segue alleged that he refused to "obey" Mullin's instructions without first obtaining the consent of the Board of the Wayne County Detroit CDE, Inc. and that he prepared a resolution for the Board that would enable the transfer.[5] A fair reading of Segue's allegations shows that he claims that he was fired not in retaliation for "reporting" suspected illegal activity, but rather for refusing to "obey" Mullin's request to make the transfer without the Board's prior approval; his advice was merely his justification for refusing to proceed.

Mullin's reason for firing Segue is key to resolving this issue. Under Michigan's common law, an employer cannot discharge an at-will employee for refusing to perform an illegal act during the course of his employment. *Suchodolski v Mich Consol Gas Co*, 412 Mich 692, 695; 316 NW2d 710 (1982). And Segue plainly alleged he was fired for "refusing to engage in an illegal act" as opposed to for "reporting" one. He also did not allege that he reported a "violation or suspected violation" of law. To the contrary, Segue alleged that he told Mullin the transfer of the funds at issue "*would be* improper and illegal." (Emphasis supplied.) Because the WPA does not protect an employee from retaliation for refusing to perform an illegal act, see MCL 15.362, it does not preempt Segue's claim that Mullin wrongfully discharged him for refusing to perform an illegal act. *Driver*, 226 Mich App at 566.

The trial court erred when it concluded otherwise and dismissed Segue's claim against Wayne County on that basis.

III. FAILURE TO STATE A CLAIM

Finally, on interlocutory appeal, Mullin challenges the trial court's decision to deny her motion to dismiss under MCR 2.116(C)(8). Specifically, Mullin claims that, because she did not act solely for her own interest in firing Segue, he cannot maintain a claim for tortious interference. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg*, 285 Mich App at 369.

"The elements of tortious interference with a contract are (1) the existence of a contract, (2) a breach of the contract, and (3) an unjustified instigation of the breach by the defendant." *Knight Enterprises v RPF Oil Co*, 299 Mich App 275, 280; 829 NW2d 345 (2013) (quotation marks and citation omitted). "One who alleges tortious interference with a contractual . . . relationship must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights . . . of

[5] The trial court stated that Segue threatened to report Mullin's alleged illegal directive to the Wayne County Detroit CDE, Inc., Board, but he actually alleged in his complaint that he prepared and submitted a resolution for the Board that would "accomplish the task" of transferring the funds. That is, he did not threaten to report anything—he merely offered an alternative approach to achieve the same end properly.

another." *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 382; 689 NW2d 145 (2004) (quotation marks and citation omitted). A party to a contract cannot maintain a cause of action for tortious interference against another party to that same contract. *Id*. This means that "corporate agents are not liable for tortious interference with the corporation's contracts unless they acted solely for their own benefit with no benefit to the corporation." *Reed v Mich Metro Girl Scout Council*, 201 Mich App 10, 13; 506 NW2d 231 (1993). "Such a claim requires proof, with specificity, of affirmative acts by the defendant[] which corroborated the unlawful purpose of the [tortious] interference." *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 657; 513 NW2d 441 (1994) (quotation marks and citation omitted).

Segue alleged that Mullin acted for her own benefit in firing him. Specifically, he alleged that Mullin repeatedly pressured him to "divert" funds from the CDE to the Wayne County Business Development Corporation, an account from which she had received a $75,000 bonus; the CDE was funded by undisclosed political contributors; politicians utilized the CDE for "questionable activities" including "elaborate trips"; the former Deputy Director of the CDE cautioned Segue that Mullin's predecessor was previously ordered to return funds to the CDE after making a similar transfer of funds; and that Mullin terminated Segue after he submitted a resolution for approval to the CDE Board. These allegations permit an inference Mullin's order to transfer the funds and her decision to fire Segue were to benefit and protect herself rather than the Department. At the very least, the allegations would permit further discovery to shed light on the circumstances surrounding the request and Mullin's decision to discharge Segue.

Mullin counters that because Segue is bound by his allegation that Mullin acted "during the course of her employment and within the scope of her authority" when she fired him, Segue cannot show that she acted solely for her own benefit. But whether Mullin acted within the scope of her authority does not change this analysis. Indeed, this Court has already held that an employee's exercise of authority within the scope of his employment "'does not immunize his conduct if he used his authority to further his own ends at the plaintiff's expense.'" *Stack v Marcum*, 147 Mich App 756, 760; 382 NW2d 743 (1985) (emphasis removed), quoting *Seven D Enterprises, Ltd v Fonzi*, 438 F Supp 161, 164 (ED Mich, 1977).[6] Segue's complaint is therefore not self-defeating.

We also decline Mullin's invitation to revisit whether at-will employment contracts are the proper subject of a tortious interference claim. A special panel of this Court has already held that they are. *Health Call of Detroit v Atrium Home & Health Care Servs, Inc*, 268 Mich App 83, 93; 706 NW2d 843 (2005). And we are not at liberty to revisit that issue again. MCR 7.215(J)(6). We similarly reject Mullin's argument that Segue's claim should be dismissed because his damages are speculative. This Court held in *Health Call of Detroit* that the establishment of a tortious interference claim "provides a basis to award damages in some form[,]" *id*. at 93, although nominal damages may be "the limit of recovery[,]" *id*. at 103.

[6] While Mullin cites case law in support of the proposition that Segue must show that the agent acted outside the scope of his authority to establish tortious interference, her authority did not address the situation where the agent used his authority solely for his own ends.

For these reasons, we affirm the trial court's order to the extent that it denied Mullin's motion for summary disposition. However, we reverse the trial court's decision and vacate its order to the extent that it dismissed Segue's claim against Wayne County. We further remand this case for further proceedings consistent with this opinion.

Affirmed in part, reversed and vacated in part, and remanded for further proceedings. We do not retain jurisdiction. As the prevailing party, Segue may tax his costs. MCR 7.219(A).

/s/ Mark J. Cavanagh
/s/ Donald S. Owens
/s/ Michael J. Kelly